

# Democracy and Equality

By  
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If democracy is defined as the form of government dedicated to the realization of the values of self-determination, democracy bears a complex relationship to equality. Democracy requires equality of democratic agency, which is different from the forms of equality that flow from the values of distributive justice or fairness. Indeed, insofar as the forms of equality demanded by distributive justice are defined by reference to philosophic reason, rather than by reference to democratic self-determination, there is an intrinsic tension between democracy and distributive justice. This tension is reflected in the common conflict between rights and legislative competence. But insofar as violations of the equality required by distributive justice impair democratic legitimacy, democracy requires that these violations be rectified. Changing conceptions of distributive justice may thus fundamentally alter the preconditions of democratic legitimacy.

*Keywords:* democracy; equality; collective decision making; freedom of expression; autonomy; public discourse; justice; legitimacy

In this article, I shall discuss the relationship between democracy and equality. Consideration of this topic is made difficult because “democracy” is such a notoriously vague and encompassing term. It is often used as an elastic synonym for good government, stretching to include whatever is desirable in a state. Understood in this way, of course, the idea of democracy loses specific content and analytic bite. If democracy means merely good and desirable government, we need not discuss democracy at all but only the forms of equality that ought to characterize a modern state.

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In this article, I shall take a very different path. I shall closely examine the meaning of democracy, and, having fixed a definition, I shall discuss the logical and practical connections between this definition and various forms of equality. I begin with what I take to be the unobjectionable premise that democracy refers to “the distinction between autonomy and heteronomy: Democratic forms of government are those in which the laws are made by the same people to whom they apply (and for that reason they are autonomous norms), while in autocratic forms of government the law-makers are different from those to whom the laws are addressed (and are therefore heteronomous norms)” (Bobbio 1989, 137). The question I shall address is the relationship between autonomous forms of government and equality.

## I

What does it mean for a form of government to be autonomous? Democracy is not the same thing as popular sovereignty, a state of affairs in which the people exercise ultimate control over their government. Popular sovereignty is compatible with forms of popular fascism in which a dictator carries the genuine and spontaneous approval of an entire people.<sup>1</sup> Nor is democracy identical to majoritarianism, in which a majority of the people exercise control over their government.<sup>2</sup> Although it is frequently said “any distinct restraint on majority power, such as a principle of freedom of speech, is by its nature anti-democratic, anti-majoritarian” (Schauer 1982, 40-41), a majority of the electorate can implement rules that are plainly inconsistent with democracy, as for example by voting a monarchy into office. These examples suggest that popular sovereignty and majoritarianism may be intimately associated with the practice of democracy, but they themselves do not define democracy. That is why it is not unintelligible to conclude that particular exercises of popular sovereignty or majoritarianism are antidemocratic.

Democracy is distinct from popular sovereignty and majoritarianism because democracy is a normative idea that refers to substantive political values (Michelman 1998), whereas popular sovereignty and majoritarianism are descriptive terms that refer to particular decision-making procedures. Implicit in the idea of democracy are the values that allow us to determine whether in specific circumstances particular decision-making procedures are actually democratic. Governments, for example, do not become democratic merely because they hold elections in which majorities govern. Such elections are currently held in North Korea. To know whether these elections make North Korea democratic requires an inquiry into whether these elections are implemented in a way that serves democratic values. It is a grave mistake to confuse democracy with particular decision-making procedures and to fail to identify the core values that democracy as a form of government seeks to instantiate.

The values of autonomy are essential to democracy. In the context of government, these values are associated with the practice of self-determination (Kelsen

1961, 284-86). We must ask, therefore, what it means for a people to engage in the practice of self-determination. This practice is often interpreted to mean that a people be made ultimately responsible for governmental decisions, either by making such decisions directly or by electing those who do (Meiklejohn 1948). But in my view this is an insufficient account of the practice of self-government. For reasons that I shall explain, I think it preferable to say that the practice of self-government requires that a people have the warranted conviction that they are engaged in the process of governing themselves.<sup>3</sup> The distinction is crucial, for it emphasizes the difference between making particular decisions and recognizing particular decisions as one's own. Self-government is about the authorship of decisions, not about the making of decisions.

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We can test this distinction by imagining a situation in which the people in their collective capacity decide issues but in which individuals within the collectivity feel hopelessly alienated from these decisions. Suppose, for example, that in State X citizens are provided with interactive computer terminals that they are required to use in the morning to register their preferences about various issues. Each morning, an agenda for decision (composed by an elected assembly) is presented on the terminal. The citizens of State X must decide what color clothes should be worn, what menu should be served for lunch and dinner, the boundaries of the attendance zones for the neighborhood school, whether a stop sign should be placed at a local intersection, and so on. Assume that citizens of State X can get from their computer whatever information they believe is relevant for their votes, including information about the likely views of other citizens.

Imagine, further, that State X has no public discourse. There are neither newspapers nor broadcast media. The state bans political parties and associations. It proscribes public demonstrations and prohibits individuals from publishing their views to other citizens. Each citizen must make up his or her mind in isolation. Decisions in State X, however, are made on the basis of the majority vote of the collectivity, and all individuals are henceforth required to comply: to wear blue, or to

serve chicken for lunch, or to attend a particular school, or to stop at the local intersection. Individuals in State X feel completely alienated from these decisions. They do not identify with them and instead feel controlled and manipulated by the external force of the collectivity.

Would we deem State X an example of a society that engages in self-determination? Although in State X the people retain their ability, “as a collectivity, to decide their own fate” (Fiss 1996, 37-38), which is to say to make decisions by majority rule, I very much doubt that we would characterize State X as a democracy. We are much more likely to condemn it as a dystopian tyranny. Rousseau long ago diagnosed the reason for this condemnation: collective decision making is merely oppressive unless there is some internal connection between the particular wills of individual citizens and the general will of the collectivity (Rousseau 1968, 58-62).<sup>4</sup>

Of course, it is implausible to claim, as Rousseau might be thought to claim, that there can exist a complete identity between the particular wills of individual citizens and the general will of the democratic state. It is enough that individual citizens can recognize in that general will the potentiality of their own authorship (Post 1993b). When this occurs, collective decision making is democratic because it is experienced as self-determination. But when citizens feel alienated from the general will, or from the process by which the general will is created, voting on issues is merely a mechanism for decision making, a mechanism that can easily turn oppressive and undemocratic.

It follows that the value of democracy can be fulfilled only if there is a continual mediation between collective self-determination and the individual self-determination of particular citizens.<sup>5</sup> If democracy requires that citizens experience their government as their own, as representing them, they must experience the state as in some way responsive to their own values and ideas. How is this theoretically possible under modern conditions of diversity, when the citizens of a state are heterogeneous and disagree with each other? The focus of analysis must shift from specific state decisions to the process by which these decisions are authorized. Citizens must experience that process as responsive to their own values and ideas.

This is the theory of the American First Amendment, which rests on the idea that if citizens are free to participate in the formation of public opinion, and if the decisions of the state are made responsive to public opinion, citizens will be able to experience their government as their own, even if they hold diverse views and otherwise disagree. That is why the First Amendment, which is antimajoritarian, is nevertheless regarded as “the guardian of our democracy.”<sup>6</sup> Han Kelsen (1961), speaking of democracy rather than of the First Amendment, put the matter this way:

A subject is politically free insofar as his individual will is in harmony with the “collective” (or “general”) will expressed in the social order. Such harmony of the “collective” and the individual will is guaranteed only if the social order is created by the individuals whose behavior it regulates. Social order means determination of the will of the individual. Political freedom, that is, freedom under social order, is self-determination of the individual by participating in the creation of the social order. . . .

The will of the community, in a democracy, is always created through a running discussion between majority and minority, through free consideration of arguments for and against a certain regulation of a subject matter. This discussion takes place not only in parliament, but also, and foremost, at political meetings, in newspapers, books, and other vehicles of public opinion. A democracy without public opinion is a contradiction in terms. (Pp. 285-88)

The First Amendment protects the communicative processes by which the American people work toward an "agreement" that is "uncoerced, and reached by citizens in ways consistent with their being viewed as free and equal persons" (Rawls 1985, 229-30). Of course, under conditions of modern heterogeneity, actual agreement is impossible, so the notion of agreement functions merely as a "regulative idea" (Findlay 1981, 241) for the formation of public opinion. If we use the term *public discourse* to refer to the communicative processes by which public opinion is formed, we can say that public discourse continuously but unsuccessfully strives to mediate between individual and collective self-determination to produce "a common will, communicatively shaped and discursively clarified in the political public sphere" (Habermas 1987, 81).

In a modern democracy, therefore, citizens are free to engage in public discourse to make the state responsive to their ideas and values, in the hope that even if the state acts in ways inconsistent with those ideas and values, citizens can nevertheless maintain their identification with the state. There is much about the constitutional law of freedom of expression that follows from this formulation, but for present purposes I shall emphasize only that modern democracies on this account must regard their citizens, insofar as they engage in public discourse, as equal and autonomous persons. That is why Jean Piaget (1965, 362-63) was profoundly correct to observe that "the essence of democracy resides in its attitude toward law as a product of the collective will, and not as something emanating from a transcendent will or from the authority established by divine right. It is therefore the essence of democracy to replace the unilateral respect of authority by the mutual respect of autonomous wills."

## II

We are now in a position to deduce our first postulate about the relationship between democracy and equality. Democracy requires that persons be treated equally insofar as they are autonomous participants in the process of self-government. This form of equality is foundational to democracy because it follows from the very definition of democracy. Democracy requires an equality of democratic agency.

Democracy continuously strives to reconcile the self-determination of individual citizens with the self-government of the state. This means that democracy must regard each citizen as an autonomous, self-determining person, at least insofar as is relevant to maintaining a live identification with the self-government of the state.

Every citizen is equal in this regard. To the extent that the state treats citizens unequally in a relevant manner, say by allowing some citizens greater freedom of participation in public discourse than others, the state becomes heteronomous with respect to those citizens who are treated unequally. The state thereby loses its claim to democratic legitimacy with respect to those citizens. It follows that every citizen in a democracy is entitled to be treated equally in regard to the forms of conduct that constitute autonomous democratic participation.

This definition of democratic equality is of course formal and functional. Its precise content must be established by specifying the forms of democratic participation. These forms are given to us socially and historically, and different forms will imply different forms of democratic equality. For example, equality in the context of voting will be different than equality in the context of public discourse. Voting to select national or statewide officials is understood to be a method through which citizens participate in the choice of their leaders. Because all citizens are affected by this choice, we recognize citizens' equality of agency by the principle of "one person, one vote." The principle signifies that each citizen is to be regarded as formally equal to every other in the influence that their agency can contribute to public decisions.

The purpose of communication within public discourse, by contrast, is not to make decisions but to empower citizens to participate in public opinion in ways that will permit them to believe that public opinion will become potentially responsive to their views. Whereas equality in voting is measured in terms of equality of influence on ultimate decisions, equality of participation in public discourse cannot be measured in this way. Because influence in public debate is a matter of persuading others to one's point of view, the state can equalize influence on public debate only if it controls the intimate and independent processes by which citizens evaluate the ideas of others. Such efforts are intrinsically undesirable when performed by the state, both because ideas are not equal—the very structure of public debate rests on the premise of distinguishing good ideas from bad ideas—and because any such governmental efforts likely would verge on the tyrannical.

For these reasons, equality of agency in the context of public discourse is measured by guaranteeing each citizen the right to express himself in public discourse in a manner that will allow him to believe that public opinion will be responsive to his agency. This function cannot be achieved by offering each citizen the identical quantity of expression because a citizen may well deem a given quantity of expression as inadequate to her communicative needs and hence become alienated from public opinion, even if that quantity is equal in amount to that given to every other citizen. For this reason, the First Amendment characteristically permits persons to speak in the ways, manner, and circumstances of their choosing. The First Amendment rests on the hope that when persons are free to speak in ways that they believe are adequate to their meaning and conviction, they can come to feel that they have been given the opportunity to affect public opinion and hence can maintain an identification with a state that is responsive to public opinion. If the state too closely regulates when and how a person may speak, speech may lose its ability to

mediate between individual and collective self-determination. In the context of public discourse, therefore, the relevant equality of agency inheres in the liberty to express oneself in the manner of one's choice.

There is sometimes tension between speech as an instrument of individual self-determination and speech as an instrument of collective self-determination. In the context of election campaigns, for example, there have been frequent calls for regulation of public discourse. Consider the following:

1. The speech of candidates is to be restricted on the ground that the population as a whole has come to view elections as illegitimate because some candidates are so wealthy that their speech is vastly more prominent than that of other candidates. Speech restrictions are justified on the "democratic legitimacy" principle.
2. The speech of candidates is to be restricted on the ground that all candidates should have equal access to the electorate, and some candidates are so wealthy that their speech is vastly more prominent than that of other candidates. Speech restrictions are justified on a "fairness" principle, which holds that each candidate should be allocated the "same" amount of speech as every other, so that no candidate can "drown out" the speech of her competitors.

Scenario 1 points to a genuine dilemma within democratic theory because it postulates conditions in which speech that serves the purposes of individual autonomy has compromised the ability of public discourse to serve as a medium of collective self-determination. If personal autonomy is restricted by censoring the speech of individual candidates, democratic legitimacy is lost with respect to those candidates. Yet the unrestricted exercise of individual autonomy will undermine the capacity of public discourse to serve its larger function of mediating between individual and collective autonomy for the remainder of the population. The state will compromise democratic values either by regulating or by not regulating. Although scenario 1 seems to postulate a question of the relationship between democracy and equality, it actually poses the question of how, within the terms of democratic theory, the purposes of self-government may best be served.

### III

In this regard, scenario 1 sharply contrasts to scenario 2. In scenario 2, the speech of candidates is regulated on the grounds of a "fairness" principle that does not derive from the logic of democratic legitimacy but instead from an independent notion of "equality" as between candidates.<sup>7</sup> If in scenario 2 inequality among the candidates has not caused a delegitimation of the election process, censorship under scenario 2 would compromise the autonomy of candidates without a corresponding gain in collective autonomy. The concept of equality at issue in scenario 2 may therefore be in tension with the purposes of democratic legitimacy, which requires that candidates be accorded the equality to act autonomously, not the equality associated with equal amounts of speech (Post 1997, 1534-38).



This conclusion is quite powerful, for it suggests that many forms of equality associated with notions of distributive justice or fairness might actually be inconsistent with democracy. This inconsistency occurs whenever the demands of distributive justice compromise the autonomous participation of persons within democratic self-government, which is necessarily presupposed by the project of autonomous self-determination. From the perspective of the egalitarian principles that underlie distributive justice, the requirements of autonomous self-determination can come to seem regressive and libertarian. The equality required by democracy, which is an equality of autonomous self-determination, can easily be experienced as thin and formal, in contrast to the robust forms of substantive equality typically associated with theories of distributive justice.

The tension between equality and liberty that currently characterizes First Amendment jurisprudence is typically located at the boundary between an idea of equality that focuses on the equality of agency, and an idea of equality that focuses on distributive justice or fairness. Consider, for example, these two scenarios:

3. The speech of citizen A, which consists of fighting words, alienates all other citizens from participating in public discourse.
4. The speech of citizen A, which consists of racist speech, alienates citizens in group B from participating in public discourse.

In scenario 3, state censorship of citizen A, which will alienate A from public discourse and therefore sever A from the possibility of experiencing democratic legitimacy, is justified in terms of protecting public discourse. Whether and how such censorship can be justified as consistent with democracy is a question that must be settled entirely with the logic of democratic legitimacy.

In scenario 4, by contrast, state suppression of the speech of citizen A is justified in terms of protecting the access to public discourse of group B, rather than in terms of the requirements of public discourse itself. Scenario 4 is typical of the tension within First Amendment jurisprudence that characterizes controversies like the regulation of hate speech, which was involved in the infamous march of Nazis through Skokie, or in the suppression of pornography, which is said to subordinate women. In scenario 4, the potential loss of democratic legitimacy to A in suppressing his speech must be weighed against the potential loss of democratic legitimacy to group B in failing to suppress the speech.

This balance can perhaps be struck within the logic of democratic legitimacy, as in scenario 3. But it is commonly said that the balance ought to be struck by taking account of the substantive claims for equality that group B may be thought to press. This is especially true if group B is otherwise subordinated or oppressed.<sup>8</sup> To the extent that the balance is struck in this way, and to the extent that this resolution of the question produces results that are different than would be reached were the question to be resolved solely within the logic of democratic legitimacy, the claims of substantive equality are in tension with democracy.

Much depends, therefore, on our understanding of the logic of democratic legitimacy. This logic requires that citizens be treated equally with respect to the



requirements of autonomous participation in the practice of self-government. The nature of these requirements will depend upon our precise account of the prerequisites of autonomous agency. So, for example, Amartya Sen is famously associated with “the capability approach” (Sen 1993, 43), which argues that each person should be endowed with a certain set of capabilities that correspond to “his or her actual ability to achieve various valuable functionings as a part of living.”<sup>9</sup> Sen is notably, and perhaps intentionally, ambiguous as to whether the set of capabilities to be accorded to each person are to be measured by the criteria of “justice as fairness,”<sup>10</sup> or instead by the criteria of “autonomy” (Sen 1982, 24).<sup>11</sup> Understood in the latter sense, democracy may require equal distribution of the capability set required for autonomous personhood; understood in the former sense, democracy may be in tension with equal distribution of the capability set required by distributive justice.

#### IV

The association of democracy with the equality principles of distributive justice is widespread and common. I recently addressed a conference in Mexico, for example, where the question for discussion was, “Does democracy require a broader egalitarian notion that levels all social, cultural, and economic differences inconsistent with the moral equality of all citizens?” This framing of the issue plainly focuses on the relationship between democracy and strong substantive egalitarian principles. I have so far argued, however, that democracy presupposes a different kind of equality, an equality measured in terms of the autonomous agency required by democratic legitimacy. And I have also argued that the egalitarian principles of distributive justice or fairness can in particular circumstances be in tension with democracy.

This conclusion will no doubt be controversial because it is generally thought that implicit within the idea of democracy is a notion of strong substantive equality that flows from the moral equality of citizens.<sup>12</sup> But if democracy is understood, as I have argued, to rest fundamentally on a commitment to collective self-determination, it requires only those forms of equal citizenship that are necessary for the project of collective self-determination to succeed. And, as we have noted, many forms of equality can actually interfere with the individual liberty required by this project. At root, a deep theoretical tension exists between democracy and various notions of distributive justice that seek to protect the moral equality of citizens. Insofar as democracy is a form of government committed to self-determination, democracy must also encompass self-determination about the meaning of the moral equality of citizens.<sup>13</sup>

What counts as “moral equality” will no doubt be controversial, and a democracy will settle these controversies by reference to the self-determination of its citizens. A democracy will decide the meaning of moral equality in the context of public discussion and debate. Advocates of strong egalitarian principles have typically regarded such debate as offering inadequate protection for distributive justice

because they believe that the judgment of citizens may be distorted due to the influence of prejudice and bias.<sup>14</sup> They have consequently used the idea of rights precisely to cabin the exercise of self-determination. The substance of these rights is characteristically determined by reference to various forms of philosophical reason. This reason can be in tension with, and deeply antithetical to, the political determinations of democratic legitimacy.

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It is not the case, however, that democracy and strong egalitarian principles must necessarily be in opposition to each other. Strong egalitarian principles may, in particular circumstances, have significant democracy-reinforcing effects. Democracy requires that persons identify with the state, even if they disagree with the particular decisions of the state. Although free participation within public discourse is a *necessary* condition for this identification, it is far from a *sufficient* condition. Imagine for example a group of citizens who are free to speak and to participate within the sphere of public opinion, but who are nevertheless destitute, marginalized, stigmatized, and subordinated. These citizens are unlikely to identify with the state in the manner required by democratic legitimacy. The unequal treatment of these citizens may well lead to their alienation. In such a case, the maintenance of democratic legitimacy would require that this alienation be ameliorated, which may entail remediating the alienating conditions of inequality.

What follows from this reasoning is not that democracy includes within it commitments to strong egalitarian principles but rather that the systematic violation of these principles may sometimes lead to the failure of democratic legitimacy. The distinction is significant because whereas democracy affirmatively requires that citizens be treated as equal with regard to the dimensions of their autonomous agency relevant for democratic legitimation, it contains no such requirement with regard to other inequalities. Democracy requires only that inequities that undermine democratic legitimacy be ameliorated. It does not require this for reasons of fairness or distributive justice, or because of any philosophic commitments that stand outside of democratic debate and decision making, but simply because such inequities undermine democratic legitimacy (Post 1998, 22-24; 2004). Democracy does not require the full rectification of these inequities, but only the rectification necessary to maintain democratic legitimacy.

The unsettling implication of this reasoning is that democracy is quite compatible with important forms of status subordination, as long as these forms of subordination are not experienced by citizens as alienating. At a time when the disempowering of women was accepted as natural and just, for example, democracy did not require that this terrible form of subordination be ended.<sup>15</sup> But as soon as this injustice functioned to alienate citizens from their government, democracy-based arguments became available to maintain that this disempowerment was incompatible with democratic legitimacy and was therefore to be ameliorated in the name of democracy.

This example suggests that strong egalitarian principles can establish a dynamic and dialectical relationship to democracy. As these principles become politically salient, as they make inequities visible and oppressive, as they prompt citizens to experience these inequities as alienating, they prepare the way for the eventual emergence of democracy-based arguments for the amelioration of these inequities. There is thus an intimate relationship between democracy and strong egalitarian principles. Democracy does not itself entail these principles but is itself substantially affected by them because it must perennially reckon with the threats to democratic legitimacy generated by these principles. Democracy is in this sense tightly connected to egalitarian commitments.

We should not forget, however, that egalitarian commitments can also endanger the autonomy necessary for the practice of self-government. Democracy and equality are thus bound in an indissoluble knot, mutually reinforcing and mutually antagonistic.

## Notes

1. On the distinction between democracy and popular sovereignty, see Post (1998a, 1998b).
2. For a contrasting viewpoint, see Dahl (1957, 67).
3. The concept of a "warranted conviction" is meant to signify that a subjective conviction of self-government is not a determinative and preclusive condition for the realization of democratic values. The conviction must withstand scrutiny, which means that it is always open to third parties to attempt to convince a citizen that his or her experience of self-government is delusory.
4. Ironically, Rousseau seemingly contemplated that the general will would be formed through just such an alienated process as I have sketched. "From the deliberations of a people properly informed, and provided its members do not have any communication among themselves, the great number of small differences will always produce a general will and the decision will always be good" (Rousseau 1968, 73). This suggests that Rousseau may have had a finer grasp of the analytic prerequisites of democracy than of the sociological dynamics necessary for its realization.
5. I have elsewhere argued that "the essential problematic of democracy . . . lies in the reconciliation of individual and collective autonomy" (Post 1995, 7). For a full discussion, see Post (1993a, 178-79).
6. *Brown v. Hartlage*, 456 U.S. 45, 60 (1982).
7. For a particularly clear statement of this notion, see, e.g., *Harper v. Canada* (Attorney General), 2004 SCC 34, at § 63. ("The current third party election advertising regime is Parliament's response to this Court's decision in *Libman* [v. Quebec (Attorney General), [1977] 3 S.C.R. 569]. The regime is clearly structured on the egalitarian model of elections. The overarching objective of the regime is to promote electoral fairness by creating equality in the political discourse. The regime promotes the equal dissemination of points of view by limiting the election advertising of third parties who, as this Court has recognized, are important and influential participants in the electoral process.")

8. Indeed, it is commonly claimed that the speech of A should be censored not to protect public discourse but to promote the just demands of group B for equality (Matsuda 1989, 2358).

9. Sen (1993, 30).

10. Sen (1990) developed the capabilities approach as a response to Rawls.

11. In this earlier piece, Sen (1990, 116) labeled his approach “a capability rights system.” In later work, Sen (1993, 39) referred to this aspect of his theory as “well-being freedom,” which refers to “a person’s actual freedom to live well and be well.” Sen was explicit that freedom is valuable as both an end and as a means (Drèze and Sen 2002, 1-8).

12. For example, Amy Gutman (2003, 26) wrote, “When I use the term democracy, it signifies a political commitment to the civil equality of individuals.”

13. For examples, see Ackerman (1991, 26-27).

14. Ackerman (1991, 10-14); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

15. Although democracy requires that citizens who are participants in the practice of self-government be treated equally insofar as their participation is concerned, it does not itself define the set of citizens who must be deemed participants. As Ivor Jennings (1956, 56) has remarked, “The people cannot decide until someone decides who are the people.” Even today, for example, children are not considered participants in the democratic process.

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